COURT'S INSTRUCTIONS TO THE JURY

Introduction

Members of the Jury:

As you know, we had to release a juror because of health reason. As a result, and as I discussed with you individually, by law you are required to begin your deliberations anew. That means that any notes you have about your prior deliberations will be collected and destroyed. You have to start from scratch in your discussions of the case and your efforts to reach a verdict.

Before you begin those new deliberations, I am required by law to again give you instructions about the law. Although the vast majority of these instructions are identical to the ones I read to you a few weeks ago, I have tried to incorporate into them the clarifications that I gave you in response to your questions.

You need to listen intently again to these instructions about the law so that you will understand the legal standards that you must apply in reaching your verdict. Because we have so many legal instructions to cover in this case, I will be giving you a written copy of these instructions when you retire to deliberate. But that does not mean that you should not listen carefully and take you own notes.

A jury trial has, in effect, two judges. I am one of the judges; you, the jury, is the other judge. My duty is to preside over the trial, to make procedural decisions, and to determine what evidence is proper for your consideration. Part of my job as judge requires me to serve as a kind of referee, making certain that everyone plays by the rules established to ensure a fair trial for both sides. If someone disregards those rules or steps out of line, the judge, like any good referee, must blow the whistle and enforce the rules. My duty now at the end of the trial is to explain to you the law that you must follow and apply to the facts as you find them in arriving at your verdict.

First, I will give some general instructions that apply in every criminal case; for example, instructions about the burden of proof, how to judge the believability of witnesses, and some legal definitions that apply throughout these instructions. I will also give you some specific rules of law about the offenses charged in this particular case. I will also explain the procedures you should follow in your deliberations.

Duty of Jury

In a nutshell, your duty will be to decide whether the Government has proved beyond a reasonable doubt the specific elements necessary to find Mr. Scrushy guilty of the crimes charged in each count of the Superseding Indictment.

Impartiality

As I have already told you, you must make your decision only on the basis of the testimony and other evidence presented in this courtroom during the trial. You must not be influenced in any way by either sympathy or prejudice for or against Mr. Scrushy, nor by sympathy or prejudice for or against the Government. You also should not be influenced by the skills and personalities of the attorneys involved in the case.

In short, you must be impartial and fair in your deliberations.

Duty to Follow Instructions

You, as jurors, are the judges of the facts. But in determining what actually happened–that is, in reaching your decision as to the facts and whether the Government has carried its burden of proof – your sworn duty is to follow all of my instructions and the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you.

You must not substitute or follow your own notion or opinion as to what the law is or ought to be. Your duty is to apply the law as I explain it to you, regardless of whether you like the law or its consequences.

Also, if any attorney or witness has stated a legal principle different from any that I state to you in my instructions, you must ignore such statements and follow my instructions.

Your duty is to reach your verdict solely upon the evidence without prejudice or sympathy. You made that promise and took that oath before being accepted by the parties as jurors, and they have the right to expect nothing less from each of you.

In reaching your decision as to whether the Government has met its burden of proof, you should not consider any personal feelings you may have about Mr. Scrushy's race, religion, wealth, or lifestyle. All persons are entitled to the presumption of innocence, and the Government has the burden of proof, as I will discuss in more detail in a moment. You should not allow any feelings you might have about the nature of the crimes charged to interfere with your decision-making process.

Rather, the crucial question that you must ask yourselves as you sift through the evidence is: Has the Government proven the guilt of Mr. Scrushy beyond a reasonable doubt?

If you were to let bias, prejudice, fear, sympathy, or any other irrelevant consideration interfere with your thinking, you would risk not arriving at a true and just verdict. So do not be guided by anything except clear thinking and calm analysis of the evidence, or absence of evidence in this case.

Related Civil Suits

As I instructed you at the beginning of the trial, your deliberations in this case concern only the Government's allegations that Mr. Scrushy violated certain laws and is subject to criminal penalties because of that conduct. This case is NOT about claims against Mr. Scrushy or HealthSouth by shareholders or employees who lost money because of the fraud. Those matters are civil matters, and many civil cases have been filed about what compensation, if any, those people are entitled to receive. Those cases, although arising from the fraud at HealthSouth, involve different legal issues and standards, and have a different burden of proof. Those civil cases have not been tried and will not be tried until some time after the end of this criminal case to protect all parties' right to a fair trial here.

Please remember that the issue before you is whether the Government has proven beyond a reasonable doubt that Mr. Scrushy committed the criminal acts the Government has alleged in this case. Penalties for any violations so proven are provided by the law and, if necessary, will be addressed by the court after you reach a verdict. Any civil liability Mr. Scrushy may owe to shareholders or employees will be determined later under the civil laws that apply to those cases. Therefore, you should not consider in any way in your deliberations any concerns that you might have about losses sustained by shareholders or employees. Those claims will be addressed elsewhere.

Presumption of Innocence

The Superseding Indictment or formal charge against Mr. Scrushy is not evidence of guilt. Indeed, every defendant, including Mr. Scrushy, is presumed by the law to be innocent unless and until the Government proves otherwise. The law does not require a defendant to prove his innocence or produce any evidence at all. Because Mr. Scrushy elected not to testify, you cannot consider his decision not to testify in any way during your deliberations. His presumption of innocence extends to his right not to testify and includes a right to have no inference drawn from his decision not to testify.

Burden of Proof

The Government carries the burden of proving Mr. Scrushy's guilt **beyond a reasonable doubt**, and if it fails to do so, you must acquit Mr. Scrushy; that is, if the Government fails to convince you beyond a reasonable doubt as to Mr. Scrushy's guilt, you must find Mr. Scrushy not guilty. You must make that decision count by count, and element by element, as I will explain later.

To decide whether the Government has met its burden of proof, you need to sift through the evidence – both testimony from witnesses and exhibits presented – determine what the true facts are, and then decide whether the facts prove the requirements of each charged offense beyond a reasonable doubt. Your duty is to decide the fact issues in the case and arrive at a verdict if you can. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence; you determine the credibility of the witnesses; you resolve such conflicts as you may find in the testimony and exhibits; and you draw whatever reasonable inferences you decide to draw from the facts as you determine them.

While the Government's burden of proof is a strict or heavy burden, the Government need not prove Mr. Scrushy's guilt beyond *all possible doubt*. The Government's proof is only required to exclude any **"reasonable doubt"**

concerning Mr. Scrushy's guilt. A "**reasonable doubt**" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced beyond a reasonable doubt that the Government has proved every required element of a charged offense, say so with a verdict of "guilty" on those counts where you are so convinced. On the other hand, if the Government failed to convince you beyond a reasonable doubt of any element of a charged offense, then you must find Mr. Scrushy "not guilty" as to that offense or count. You must make these findings of guilty or not guilty for each charged offense without regard to any personal belief or opinion that is unrelated to the proof presented in this courtroom.

"Guilty or Not Guilty"

You will note that I did not say that you have to decide whether Mr. Scrushy is guilty or *innocent*. I charge you that Mr. Scrushy is not required to prove he is innocent. The question of whether Mr. Scrushy is innocent really is not before you. Therefore, you do not have to reach that question.

Finding that the Government has not proven Mr. Scrushy guilty beyond a reasonable doubt is not equivalent to finding Mr. Scrushy innocent: it is finding that the Government has not met the required burden of proof on each element of any specific count to establish guilt beyond a reasonable doubt.

Evidence

As I said earlier, in reaching your decision, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted or accepted into the record.

Remember that anything the lawyers say – including questions, objections, statements, and arguments – is not evidence in the case. Your own recollection and interpretation of the evidence controls. What the lawyers say is not binding upon you.

Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, and my instructions during the trial to disregard certain testimony, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts. You must draw no inferences from my rulings, any comments I may have made, or from the fact that, upon occasion, I asked questions of certain witnesses. My rulings were no more than applications of the

law, and my questions were only intended for clarification or to expedite matters. In my role as referee, I on occasion had to admonish counsel, but those incidents should not be considered by you in arriving at your verdict. And also occasionally, I may have made a comment just to be sure we were all awake! You are to understand expressly that I have no opinion as to the verdict you should render in this case.

Summary Charts

You have been shown a number of summary charts and demonstrative exhibits. These charts and exhibits were used merely as summaries and analyses of testimony and documents in this case. The charts and exhibits act as visual aids for you. They are not, however, evidence in themselves. They are graphic demonstrations of underlying evidence. The underlying evidence and the weight which you attribute to it determines the value and significance of these charts. To the extent that these demonstrative exhibits conform to what you determine the underlying facts to be, you should accept them. To the extent that these demonstrative charts differ from what you determine the underlying evidence to be, you may reject them.

Direct and Circumstantial Evidence and Reasonable Inferences

You should not be concerned about whether the evidence is direct or circumstantial evidence. Both types of evidence are proper for your consideration and neither type enjoys a preference in the eyes of the law.

"**Direct evidence**" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "**Circumstantial evidence**" is proof of a chain of facts and circumstances tending to prove, or disprove, a fact that is in dispute.

Remember the comparison I gave you at the beginning of the trial about an eye witness's statement that "it's raining," as opposed to observing signs from which we could draw the conclusion that it had been raining outside while we were in court? That example, I hope, removed any mystery about circumstantial evidence. In assessing circumstantial evidence, you use your reason and experience and infer from established facts the existence or the nonexistence of some other fact.

While you should consider only the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you believe are justified in the light of your every day, life experiences. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by other evidence.

An "**inference**" is the deduction or conclusion that reason and common sense prompt a reasonable mind to draw from facts that have been proven by the evidence. Not all logically possible conclusions are legitimate or fair inferences. Only those inferences to which the mind is reasonably led or directed are fair inferences from direct or circumstantial evidence in this case. Whether to draw a particular inference is, of course, a matter exclusively for you, as are all determinations of fact.

The law makes no distinction between the weight you may give to either direct or circumstantial evidence, or to the reasonable inferences you may draw from direct or circumstantial evidence.

Credibility

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness said, and how important that testimony was. In making that decision, you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses called to testify by one side or the other concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions:

Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of this case or a related case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things about which he or she testified? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence? Was the witness candid, frank and forthright; or did the witness seem to be evasive or suspect in some way? How did the way the witness testified on direct examination compare with how the witness testified on cross-examination? Was the witness's testimony consistent or contradictory? Did the witness appear to know what he or she was talking about? Did the witness strike you as someone who was trying to report his or her knowledge accurately?

These examples are the kinds of common sense questions you should ask yourselves in deciding whether a witness is or is not truthful. You are free to ask other common sense questions, as you see fit, during your deliberations in evaluating the credibility or weight of any testimony.

How much you choose to believe a witness may also be influenced by the witness's bias. Does the witness have a relationship with the Government or the

Defendant that may affect how he or she testified? Does the witness have some interest, incentive, loyalty, or motive that might cause him or her to shade the truth? Does the witness have some bias, prejudice, or hostility that may cause him or her – consciously or unconsciously – to give you something other than a completely accurate account of the facts about which he or she testified?

You should also ask yourself whether evidence was offered tending to prove that a witness testified falsely concerning some important fact; or whether evidence was offered that at some other time a witness said or did something, or failed to say or do something, that was different from the testimony he or she gave before you during this trial. You may also consider a witness's earlier silence or inaction that is inconsistent with his or her courtroom testimony to determine whether the witness's credibility has been tarnished.

When a witness is questioned about an earlier statement he or she may have made, or earlier testimony he or she may have given, such questioning is permitted to aid you in evaluating the truth or accuracy of the witness's testimony here at this trial.

Earlier statements made by a witness or earlier testimony given by a witness are not ordinarily offered or received as evidence of the truth or accuracy of *those* statements, but are referred to for the purpose of giving you a comparison and

aiding you in making your decision as to whether you believe or disbelieve the witness's testimony that you heard at *this* trial. However, if the prior inconsistent statement of the witness was made under oath, you may also consider that sworn testimony as evidence in this case.

Whether such prior statements of a witness are, in fact, consistent or inconsistent with his or her trial testimony is entirely for you to determine. You may also decide whether to believe the earlier testimony given under oath, the testimony given in this trial, some of both, or none of either.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of whether the misstatement was intentional may depend on whether it relates to an important fact or only to an unimportant detail.

The fact that a witness has been convicted of or pled guilty to a felony offense or to a crime involving dishonesty or false statement is another factor you may consider in deciding whether you believe the testimony that witness gave in this trial.

If you find that a witness has testified falsely as to any material fact or, if you find that a witness has been previously untruthful when testifying under oath or otherwise, you may reject that witness's testimony in its entirety or you may accept only those parts that you believe to be truthful or that are supported by other independent evidence in the case.

Remember that you are the sole judges of the credibility of the witnesses.

Government Inducements for Witness Testimony

However, the testimony of some witnesses must be considered with more caution than the testimony of other witnesses.

In this case, the Government called as some of its witnesses persons who have admitted they participated in the fraud at HealthSouth. The Government entered into plea agreements with these witnesses providing for the possibility of lesser sentences than these witnesses would otherwise face. Such plea bargaining, as it's called, has been approved as lawful and proper and is expressly provided for in the rules of this court. The existence of such an agreement with a witness, however, is one factor you should consider in evaluating the credibility of that witness's testimony.

Not every inducement to a witness is part of a plea bargain. For example, witnesses may hope for or may be offered a promise of no prosecution at all; they

may hope for or be promised that a family member will not be prosecuted; or witnesses may hope for or may be promised that the Government will not seek to forfeit the property of that witness or a family member. Such inducements may be suggested by the Government to a witness or assumed by the witness without including them in a formal plea bargaining agreement. Or, such inducements may not be expressed, but may merely be wishful thinking on the part of the witness that still may affect the witness's credibility.

So, while a witness of this kind may be entirely truthful when testifying, you should consider such testimony with more caution than the testimony of other witnesses. A witness who hopes to gain more favorable treatment may have a reason to make a false statement because the witness wants to strike a good bargain with the Government.

And, of course, the fact that a witness has pled guilty to a crime that is charged in the Superseding Indictment against Mr. Scrushy is not evidence, in and of itself, of the guilt of Mr. Scrushy or of any person other than the person who admitted his or her guilt.

Defendant's Right Not to Testify

A Defendant has a right not to testify. You cannot consider Mr. Scrushy's decision not to testify in any way during your deliberations. His decision not to

testify is not to be considered as an indication of guilt or lack of guilt. Mr. Scrushy relied on his constitutional right not to testify. Mr. Scrushy, as any defendant, has the right to rely on the presumption of innocence and the fact that the burden of proof rests on the Government throughout the trial. I instruct you, ladies and gentlemen, that you cannot consider Mr. Scrushy's decision not to testify in any way during your deliberations.

Expert Witnesses

Ladies and gentlemen, you have heard testimony from several expert witnesses in this case. As I explained during the trial, an "**expert witness**" is someone who, by education, training, and/or experience, has gained knowledge in a particular field. When knowledge of a technical subject matter might be helpful to the jury, an expert witness in that field is permitted to state an opinion concerning those technical matters. You must consider the reasons given for those opinions and decide for yourself whether they are sound and whether they are supported by the evidence. Also, if the expert witness cannot explain his reasons to you in a way that you can understand, you may reject his conclusions. Likewise, if you determine an expert's assumptions are not reasonable and, therefore, his conclusions are unreliable, you may reject that expert's testimony.

You must also keep in mind that you are the ultimate judge of whether you are persuaded beyond a reasonable doubt that Mr. Scrushy participated in illegal conduct as charged in the Superseding Indictment, and you are not bound to accept the opinion of an expert witness–or of any witness–as to your ultimate decision.

You may consider the testimony of the expert witness and give it whatever weight and credibility you choose. Merely because an expert witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, you must decide whether to rely upon his testimony. You are the judge of the accuracy and truth of each witness's testimony, including expert witnesses. Just as you may with any witness presented by either side, you may accept all, part, or none of the testimony of any expert witness as true and accurate.

Separate Counts

The Superseding Indictment charges a separate crime or offense against Mr. Scrushy in each count. For each crime or offense, the law assigns specific requirements, referred to as "elements," that the Government must prove beyond a reasonable doubt. The law requires that the Government has the burden of proving *every* assigned element. If the Government fails to prove *one* element of a

crime, its proof comes up short and you cannot convict Mr. Scrushy of that charge. You should consider separately every element of each charge in each count, and the evidence pertaining to it.

Your decision on one count need not be the same as your decision on the other counts. In other words, you need to look at each count of the Superseding Indictment separately, and determine whether the Government has proved beyond a reasonable doubt each required element of that specific count. You should reach your decision one count at a time. However, you do not have to proceed in any particular order as you consider the various counts.

Glossary

Throughout the instructions that I am about to give concerning the specific charges, I will frequently use terms that have a specific legal meaning. Rather than define those terms every time I use them, I am now going to give you the legal definitions of some of those terms you will hear in the remainder of these instructions. These definitions apply throughout the remainder of my instructions and also apply whenever these terms are used in the Superseding Indictment, unless the context clearly indicates that some other meaning applies.

"**False**" means untrue. A statement or representation may be false if it is untrue, but it may also be false if it effectively conceals a fact. A statement or

representation is "false" or **"fraudulent"** if it relates to a material fact and is known to be untrue, provided it is made or caused to be made with intent to defraud. A statement or representation may also be "false" or "fraudulent" when it constitutes a half truth, or effectively conceals a material fact, provided it is made with the intent to defraud.

"**Honest services**" means the duty of an officer or employee of a company to act honestly and faithfully in dealings with the company, and to transact business in the best interest of the company, including a duty to disclose any material information on which the company, its shareholders, and Board members are entitled to rely in making business decisions.

"**Intent**" is the mental determination, resolve, or design to act purposely toward a specific result. Intent may be shown by actions, circumstances, and inferences.

"**Intentional**" means voluntary and not by accident.

"**Intent to defraud**" means to act knowingly and specifically to deceive or cheat someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to oneself. To **"defraud"** buyers or sellers of securities means to make a statement or representation that is untrue and known to the Defendant to be untrue, or to knowingly fail to state something that

is necessary to make other statements true, and which relates to something material or important to the purchase or sale of the securities at issue.

To **"know"** is to understand, comprehend, and possess information.

The word "**knowingly**," as that term is used in the Superseding Indictment or in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

A "**material fact"** is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction. A fact is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to whom or to which it is addressed. A false or fraudulent statement, representation or promise can be material even if the decision maker did not actually rely on the statement, or even if the decision maker actually knew or should have known that the statement was false.

"On or about " a certain date, as used in the Superseding Indictment, means a date reasonably near the date alleged.

A **"scheme or artifice to defraud**" includes any plan or course of action intended to deceive or cheat someone out of money or property by means of false or fraudulent pretenses, representations, or promises. A **"device, scheme, or artifice to defraud"** is a plan for the accomplishment of any unlawful objective.

Fraud is a general term that embraces all deceptive efforts that individuals devise to take advantage of others. It includes all kinds of manipulative and deceptive acts. The fraudulent or deceitful conduct alleged need not relate to the investment value of the securities involved in this case.

The word **"willfully**"as that term is used in the Superseding Indictment and in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either disobey or disregard the law.

"Willfully and knowingly" means done voluntarily, not by accident, and with knowledge of the nature of the act.

Your vocabulary lesson is not over. As certain counts contain words or phrases used only in those counts, I will give you some more definitions.

Throughout these instructions, you will notice that sometimes I use the word "**or**," but sometimes I use the word "**and**." These may be little words, but they are very important in terms of the legal requirements. So always check to see whether the law requires *everything* with the use of the word "*and*," or whether the law allows *alternatives* by the use of the word "*or*."

Specific Counts

I now want to shift gears and discuss the law applicable to the 36 of counts remaining in the Superseding Indictment.

COUNT ONE-- Conspiracy Introduction

Count 1 of the Superseding Indictment alleges that Mr. Scrushy participated in a criminal conspiracy. Because an understanding of the elements of the other counts will aid your understanding of the conspiracy charge, I am going to instruct you regarding the other counts before I instruct you on the conspiracy charge.

COUNT TWO: SECURITIES FRAUD

Count 2 charges securities fraud. In this case, the Superseding Indictment alleges that Mr. Scrushy knowingly executed a scheme or artifice to defraud holders of HealthSouth securities and others in connection with the securities of HealthSouth.

Title 18, United States Code, Section 1348(1) makes it a federal crime or offense for anyone to knowingly execute or attempt to execute a scheme or artifice to defraud any person in connection with any security of an issuer of a class of securities registered under section 12 of the Securities Exchange Act of 1934 or of an issuer that is required to file reports under section 15(d) of the Securities Exchange Act of 1934.

You can find Mr. Scrushy guilty of committing securities fraud as charged in Count 2 of the Superseding Indictment *only* if the Government proves all of the following elements beyond a reasonable doubt:

First: That the Defendant executed or attempted to execute a scheme or artifice to defraud a person in connection with HealthSouth securities, as described in paragraphs 23 through 40 of Count 1 of the Superseding Indictment; and

Second: That the Defendant acted knowingly and with an intent to defraud; and

Third: That HealthSouth was an issuer who registered securities under section 12 of the Securities and Exchange Act of 1934 or was required to file reports under section 15(d) of the Securities and Exchange Act of 1934; and

Fourth: For the purpose of executing or attempting to execute the scheme or artifice to defraud, the Defendant filed or caused to be filed with the SEC a Form 10-Q on or about August 14, 2002 that contained HealthSouth's fraudulently inflated financial statements.

The requirement that the fraudulent conduct be "in connection with" securities is satisfied if the Government established some nexus or relation between the allegedly fraudulent conduct and the securities. Fraudulent conduct may be "in connection with" securities if you find that the alleged fraudulent conduct touched upon the securities, or was of a sort that would cause a reasonable

investor to rely on it, and in connection with that reliance, to purchase or sell HealthSouth stock.

The Government does not need to prove that Mr. Scrushy made a profit or that anyone actually suffered a loss as a result of the conduct alleged in Count 2.

Count Three: Securities Fraud

Count 3 of the Superseding Indictment charges securities fraud under a different provision of law. In Count 3, the Government charges that Mr. Scrushy and others caused the dissemination of false financial information for HealthSouth into the marketplace in a HealthSouth Form 10-K filed with the SEC on or about March 27, 2002. The Government charges that this Form 10-K materially overstated the operating results and financial condition of HealthSouth by inflating net income and the value of assets in connection with the sale of securities, specifically Mr. Scrushy's sale of approximately 5.2 million shares of HealthSouth common stock on May 14, 2002.

Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5, make it a federal crime or offense for anyone, by the use of the means and instrumentalities of interstate commerce, the mails, or the facilities of national securities exchanges to directly or indirectly do either of the following:

(i) use or employ a device, scheme or artifice to defraud**;** or

(ii) make or cause another to make an untrue statement of a material fact or omit or cause another to omit a material fact that made what was said, under the circumstances, misleading; or

(iii) engage in an act, practice or course of business that operates, or would operate, as a fraud or deceit upon a purchaser or seller of securities.

You can find Mr. Scrushy guilty of this Count of securities fraud only if the Government proves all of the following elements beyond a reasonable doubt:

First: The Defendant caused HealthSouth to either use a device or scheme to defraud someone, OR caused HealthSouth to make an untrue statement of a material fact, or caused HealthSouth to fail to disclose a material fact which resulted in making HealthSouth's statements misleading; OR caused HealthSouth to engage in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller of securities; – You would have to unanimously agree as to which one the Defendant committed to find this element satisfied; and

Second: The Defendant acted knowingly and willfully; and

Third: The Defendant's acts to cause the dissemination of false information through HealthSouth's Form 10-K, filed on or about March 27, 2002, were in connection with Defendant's sale of 5,275,360 shares of HealthSouth common stock; and

Fourth: The Defendant used the means and instrumentalities of interstate commerce, the mails, or the facilities of national

securities exchanges, in connection with the dissemination of false information in the 10-K filing; and

Fifth: The Defendant acted for the purpose of defrauding buyers or sellers of securities.

The requirement that the fraudulent conduct be "in connection with" a sale of securities is satisfied if the Government proved some nexus or relation between the allegedly fraudulent conduct and the sale of securities. Fraudulent conduct may be "in connection with" the purchase or sale of securities if you find that the alleged fraudulent conduct touched upon a securities transaction or was of a sort that would cause a reasonable investor to rely thereon and in connection therewith so relied to purchase or sell HealthSouth stock.

The Government does not have to prove that the false financial information itself passed through the mail or through instrumentalities of interstate commerce or through facilities of national securities exchanges so long as the mail or instrumentalities of interstate commerce or facilities of national securities exchanges were used as a part of the purchase or sale transaction.

Also, the Government does not have to prove that Mr. Scrushy made a profit or that anyone actually suffered a loss as a result of the conduct alleged in Count 3.

COUNTS FOUR THROUGH SIXTEEN: WIRE FRAUD

Counts 4 through 16 of the Superseding Indictment charge that Mr. Scrushy committed wire fraud on thirteen separate occasions. The alleged instances of wire fraud are set out at pages 23 through 28 of the Superseding Indictment. I will not read each separate alleged offense of wire fraud to you because you will have the Superseding Indictment during deliberations for your reference. I will instruct you on the elements of wire fraud that you must consider with respect to each alleged occurrence.

Title 18, United States Code, Section 1343, makes it a federal crime or offense for anyone to use interstate wire communications facilities in carrying out a scheme to defraud.

Counts 4 through 16 of the Superseding Indictment each accuse Mr. Scrushy of committing wire fraud in two different alternative ways. The first alternative charges that Mr. Scrushy devised a scheme or artifice to defraud stockholders, bondholders, potential stockholders or bondholders, bond underwriters, or HealthSouth, or devised a scheme or artifice to obtain money or property by means of materially false or fraudulent pretenses, representations or promises; and, for purposes of executing this scheme and artifice to defraud, the

Defendant transmitted, or caused to be transmitted, information by wire communication in interstate commerce.

The second alternative charges that Mr. Scrushy devised a scheme or artifice to deprive HealthSouth, including its shareholders and Board of Directors, of his honest services; and for purposes of executing this scheme or artifice to deprive, the Defendant transmitted or caused to be transmitted information by wire communication in interstate commerce.

The Government does not have to prove both of these alternative fraudulent schemes for you to return a guilty verdict on each Count of wire fraud. Proof beyond a reasonable doubt on one fraudulent scheme per Count is enough, but to convict Mr. Scrushy of any of the wire fraud counts you must unanimously agree as to which alternative the Defendant committed.

A. Scheme or Artifice to Defraud or to Obtain Money or Property

For the first alternative charged, the scheme or artifice to defraud stockholders, bondholders, potential stockholders and bondholders, bond underwriters, HealthSouth, and others or to obtain money or property, you can find Mr. Scrushy guilty of committing wire fraud on one or more of Counts 4 through

16 of the Superseding Indictment *only* if the Government proves *all* of the following elements beyond a reasonable doubt:

First: That the Defendant knowingly devised or participated in a scheme or artifice to defraud stockholders, bondholders, potential stockholders or bondholders, bond underwriters, or HealthSouth, or devised or participated in a scheme or artifice to obtain money or property by means of false or fraudulent pretenses, representations or promises; and

Second: That the false pretenses, representations, or promises related to a material fact; and

Third: That the Defendant did so willfully and with an intent to defraud; and

Fourth: That the Defendant transmitted or caused to be transmitted by wire in interstate commerce some communication for the purpose of executing the scheme to defraud.

B. Scheme or Artifice to Deprive of Honest Services

As I told you earlier, the Government has also charged as an alternative method that Mr. Scrushy committed wire fraud because he allegedly devised or participated in a scheme to defraud others of the intangible right of honest services that Mr. Scrushy owed to HealthSouth and others. You may convict Mr. Scrushy of wire fraud on this theory *only* if the Government proves *all* the following elements beyond a reasonable doubt:

First: That the Defendant knowingly devised or participated in a scheme or artifice to deprive HealthSouth and others of the intangible right of honest services; and

Second: That the Defendant did so willfully and with an intent to defraud; and

Third: That the Defendant transmitted or caused to be transmitted by wire in interstate commerce some communication for the purpose of executing the scheme to defraud.

To "deprive another of the intangible right of honest services" means to violate a duty, or to cause another to violate his duty, to render honest services to HealthSouth, including its shareholders and its Board of Directors. The Government must prove beyond a reasonable doubt that Mr. Scrushy intended to breach a fiduciary duty, and that he foresaw that HealthSouth, including its shareholders and its Board of Directors, might suffer economic harm or risk economic harm as a result of that breach.

Under the law, every officer representing or working for HealthSouth owed that company, including its Board of Directors and shareholders, the duty to act honestly and faithfully in all of his dealings with the company, and to transact business in the best interest HealthSouth. That duty included a duty to disclose

any material information on which HealthSouth, its shareholders and Board members, were entitled to rely in making business decisions.

The Government does not have to prove all of the details alleged in the Superseding Indictment concerning the precise nature and purpose of the scheme; or that the material transmitted by wire was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of interstate wire communications facilities was intended as the specific or exclusive means of accomplishing the alleged fraud; or that the Defendant personally used the wire communication facility.

However, the Government must prove beyond a reasonable doubt that Mr. Scrushy, with the specific intent to defraud, knowingly devised, intended to devise, or participated in, a scheme to defraud substantially the same as the one alleged in the Superseding Indictment, and that the use of the interstate wire communications facilities was closely related to the scheme because Mr. Scrushy either used, or caused to be used, wire communications facilities in interstate commerce in an attempt to execute or carry out the scheme.

To "**cause the use**" of the interstate wire communications facilities is to do an act with knowledge that the use of such facilities will follow in the ordinary course of business, or where such use can reasonably be foreseen.

The Government does not have to prove that Mr. Scrushy made a profit or that anyone actually suffered a loss as a result of the alleged scheme described in these Counts.

Each separate use of the interstate wire communications facilities in furtherance of a scheme to defraud constitutes a separate offense, and is set out in a separate count.

Counts 4 through 16 of the Superseding Indictment accuse Mr. Scrushy of committing wire fraud by the two different fraudulent schemes I have explained: to defraud or to obtain money or property, or to deprive HealthSouth of his honest services. The Government does not have to prove both of these alleged fraudulent schemes for you to return a guilty verdict on each Count of wire fraud. Proof beyond a reasonable doubt on one alternative on each Count is enough. But to return a guilty verdict, all of you must agree that the Government has proved beyond a reasonable doubt the same fraudulent scheme regarding a particular Count of wire fraud.

In other words, for each Count, all of you must agree that the Government proved beyond a reasonable doubt that Mr. Scrushy engaged in a scheme or artifice to deprive HealthSouth of his honest services, and for purposes of executing this scheme and artifice to defraud, Mr. Scrushy transmitted or caused to be transmitted information by wire communication in interstate commerce; OR, all of you must agree that the Government proved beyond a reasonable doubt that Mr. Scrushy engaged in a scheme or artifice to defraud HealthSouth and others or to obtain money or property, and, for purposes of executing this scheme or artifice to defraud Mr. Scrushy transmitted or caused to be transmitted information by wire communication in interstate commerce.

COUNTS SEVENTEEN THROUGH TWENTY-THREE: MAIL FRAUD

Counts 17 through 23 charge that Mr. Scrushy committed mail fraud on seven separate occasions. The alleged instances of mail fraud are set out at pages 30 of the Superseding Indictment. As with the allegations of wire fraud, I will not read each separate alleged offense of mail fraud to you. I will instruct you on the elements of mail fraud that you must consider regarding each alleged occurrence.

Title 18, United States Code, Section 1341, makes it a federal crime or offense for anyone to use the United States mails in carrying out a scheme to defraud.

Counts 17 through 23 of the Superseding Indictment accuse Mr. Scrushy of committing mail fraud in two alternative ways.

The first alternative charges that Mr. Scrushy devised a scheme or artifice to defraud stockholders, bondholders, potential stockholders or bondholders, bond underwriters, or HealthSouth, or devised a scheme or artifice to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises; and for purposes of executing this scheme and artifice to defraud, Mr. Scrushy used the mails or caused the mails to be used.

The second alternative charges that Mr. Scrushy devised a scheme or artifice to deprive HealthSouth, including its shareholders and Board of Directors, of his honest services, and for purposes of executing this scheme and artifice to defraud, Mr. Scrushy used the mails or caused the mails to be used.

The Government does not have to prove both of these fraudulent schemes for you to return a guilty verdict on each Count of mail fraud. Proof beyond a reasonable doubt on one scheme per Count is enough, but to convict, you must agree unanimously as to which alternative Mr. Scrushy committed.

A. Scheme or Artifice to Defraud of Money or Property

For the first scheme charged, the scheme or artifice to defraud stockholders, bondholders, or HealthSouth, or to obtain money or property, you may find Mr. Scrushy guilty of committing mail fraud on one or more of Counts 17 through 23 of the Superseding Indictment only if the Government proves all the following elements beyond a reasonable doubt:

First: That the Defendant knowingly devised or participated in a scheme or artifice to defraud stockholders, bondholders, potential stockholders and bondholders, bond underwriters, or HealthSouth, or a scheme or artifice to obtain money or property by means of false or fraudulent pretenses, representations or promises; and

Second: That the false pretenses, representations, or promises related to a material fact; and

Third: That the Defendant did so willfully and with an intent to defraud; and

Fourth: That the Defendant used the United States Postal Service by mailing or causing to be mailed some matter or thing for the purpose of executing the scheme to defraud.

B. Scheme or Artifice to Deprive of Honest Services

As I told you previously, the Government has also charged alternatively that Mr. Scrushy devised or participated in a scheme to deprive others of the intangible right of honest services that Mr. Scrushy owed to HealthSouth and others. You may convict Mr. Scrushy of mail fraud on this theory *only if* the Government proves all the following elements beyond a reasonable doubt:

First: That the Defendant knowingly devised or participated in a scheme or artifice to deprive HealthSouth and others of the intangible right of honest services; and

Second: That the Defendant did so willfully and with an intent to defraud; and

Third: That the Defendant used the United States Postal Service by mailing or causing to be mailed some matter or thing for the purpose of executing the scheme to defraud.

To "**cause the mails**" to be used is to do an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, including where such use is by another person.

To "**deprive another of the intangible right of honest services**" means to violate a duty, or to cause another to violate his duty, to render honest services to

HealthSouth, including its shareholders and its Board of Directors. The Government must prove beyond a reasonable doubt that Mr. Scrushy intended to breach a fiduciary duty, and that he foresaw that HealthSouth, including its shareholders and its Board of Directors, might suffer economic harm or risk economic harm as a result of that breach.

Under the law, every officer representing or working for HealthSouth owed that company, including its Board of Directors and shareholders, the duty to act honestly and faithfully in all of his dealings with the company, and to transact business in the best interest HealthSouth. That duty included a duty to disclose any material information on which HealthSouth, its shareholders and Board members, were entitled to rely in making business decisions.

The Government does not have to prove all of the details alleged in the Superseding Indictment concerning the precise nature and purpose of the scheme; or that the material mailed was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of the mails was intended as the specific or exclusive means of accomplishing the alleged fraud; or that the Defendant did the actual mailing.

However, the Government must prove beyond a reasonable doubt all of the above elements, including that Mr. Scrushy, with the specific intent to defraud, knowingly devised, intended to devise, or participated in a scheme to defraud substantially the same as the one alleged in the Superseding Indictment, and that the use of the United States mail was closely related to the scheme because Mr. Scrushy either mailed something or caused something to be mailed in an attempt to execute or carry out the scheme.

The Government does not have to prove that Mr. Scrushy made a profit or that anyone actually suffered a loss as a result of the conduct alleged in these Counts.

Each separate use of the mails in furtherance of a scheme to defraud constitutes a separate offense and is set out in a separate count.

Counts 17 through 23 of the Superseding Indictment charge Mr. Scrushy of committing mail fraud by the two alternative fraudulent schemes I have explained. The Government does not have to prove both of these fraudulent schemes for you to return a guilty verdict on each charge of mail fraud. Proof beyond a reasonable doubt on one scheme per Count is enough; but, to return a guilty verdict, all of you

must agree that the Government has proved beyond a reasonable doubt the same fraudulent scheme with respect to a particular Count of mail fraud.

In other words for each Count, all of you must agree that the Government proved beyond a reasonable doubt that Mr. Scrushy engaged in a scheme or artifice to defraud HealthSouth of his honest services, and for purposes of executing this scheme or artifice to defraud used the United States Postal Service by mailing or causing to be mailed some matter or thing; OR all of you must agree that the Government proved beyond a reasonable doubt that Mr. Scrushy engaged in a scheme or artifice to defraud HealthSouth and others, or a scheme or artifice to obtain money or property, and, for purposes of executing this scheme and artifice to defraud, used the United States Postal Service by mailing or causing to be mailed some matter or thing.

COUNTS TWENTY-FIVE AND TWENTY-SIX: FALSE STATEMENTS

Counts 25 and 26 of the Superseding Indictment charge that Mr. Scrushy made false statements on two occasions as set forth at page 31 of the Superseding Indictment. I will instruct you on the elements of the crime, which you must consider with respect to each alleged occurrence. Title 18, United States Code

Section 1001 makes it a federal crime or offense for anyone to willfully make a false or fraudulent statement to a department or agency of the United States.

You can convict Mr. Scrushy of making a false statement *only* if the Government proves all the following elements beyond a reasonable doubt:

First: That the Defendant caused the statement to be made as charged; and

Second: That the statement was false; and

Third: That the falsity related to a material matter; and

Fourth: That the Defendant acted willfully and with knowledge of the falsity; and

Fifth: That the false statement was made or used in relation to a matter within the jurisdiction of the SEC.

A statement is "false" when made if it is untrue and is then known to be untrue by the person making it. The Government does not have to show that the SEC was in fact deceived or misled. The test, for purposes of this Count, is whether the false statement had the capacity to pervert or impair the functioning of the SEC.

COUNT TWENTY-SEVEN: FALSE CERTIFICATION

Count 27 charges that Mr. Scrushy committed the crime of false certification on or about August 14, 2002, when he allegedly willfully certified and willfully caused another to certify a written statement in violation of Title 18, United States Code, Section 1350(c)(2). This law is the one you have heard referred to as "Sarbanes-Oxley."

The Securities and Exchange Act of 1934, as amended, requires a company, which issues shares of stock traded in regulated markets, such as the New York Stock Exchange, to file periodic reports with the SEC containing the company's financial statements.

Sections 13(a) and 15(d) of the Securities and Exchange Act of 1934 require that issuers file quarterly reports in accordance with SEC rules and regulations. Those code sections and SEC rules and regulations require that financial statements included with quarterly reports filed on Form 10-Q include accurate and reliable financial information, including any additional information necessary to make the financial statements not misleading.

The Sarbanes-Oxley Act, Title 18, United States Code, Section 1350(a), requires the Chief Executive Officer and Chief Financial Officer of such a

company to certify in writing that the periodic reports comply with the 1934 Act, and fairly present in all material respects the financial condition and results of operations of the company. Sarbanes-Oxley makes it a federal crime for anyone to willfully certify, or willfully cause another to certify, that a periodic report filed with the SEC contains financial statements that (i) fully comply with Sections 13(a) and 15(d) of the Securities and Exchange Act of 1934 and (ii) fairly present, in all material respects, the financial condition and the results of operations of that company while knowing that the periodic report does not meet these requirements.

You can find Mr. Scrushy guilty of False Certification *only* if the Government proves all the following elements beyond a reasonable doubt:

First: That HealthSouth was an issuer of securities; and

Second: That the Defendant, as Chief Executive Officer of HealthSouth, certified in writing, OR caused the Chief Financial Officer of HealthSouth to certify in writing, a HealthSouth Form 10-Q filed with the Securities and Exchange Commission on or about August 14, 2002; and

Third: That the certification stated that the Form 10-Q (i) fully complied with the requirements of Sections 13(a) and 15(d) of the Securities and Exchange Act of 1934 and (ii) contained information which fairly presented, in all material respects, the financial condition and results of operations of HealthSouth; and

Fourth: That when the Defendant made this certification, or caused another to make this certification, the Defendant knew that the HealthSouth Form 10-Q did not comply with or meet all of these requirements; and

Fifth: That in making this certification, or in causing another to make this certification, the Defendant acted willfully.

The term "**certify**" means to confirm, or present in a formal communication, or attest as being true or meeting a standard. Under Sarbanes-Oxley, the statement of certification must be in writing and the statement must be made by the Chief Executive Officer and Chief Financial Officer.

"**Willfully**" means intending the result that actually comes to pass. A willful act is committed voluntarily and purposely, with the specific intent to violate the law. A willful act proceeds from a conscious decision of the will, and, in a criminal context, wilfulness indicates a bad purpose to disobey or disregard the law. Under Sarbanes-Oxley, for you to find that this element has been satisfied, you must unanimously agree that Mr. Scrushy made the certification described and that he did so willfully, as I have just defined that term to you.

The term "**fairly present**" means to honestly and impartially put forward information. In this case, to conclude that the periodic report did not "fairly present" the financial condition and results of operations of HealthSouth, you must

find beyond a reasonable doubt that the periodic report contained information the Defendant knew to be untrue, or that the Defendant knew the periodic report effectively concealed material information.

The law requires that the certification must state that the periodic report both complies with Sections 13(a) and 15(d) of the Securities and Exchange Act of 1934 *and* that it fairly presents the financial condition and results of operations of HealthSouth.

Thus, if you find beyond a reasonable doubt that Mr. Scrushy willfully certified or willfully caused another to certify in writing that the periodic report fully complied with all of these requirements while he knew that the periodic report did not comply with one of these requirements, then you may find him guilty of violating this provision, if you find that lack of compliance was material.

The statute requires that the periodic report fairly present the financial condition and results of operations of HealthSouth "**in all material respects**." Thus, to convict Mr. Scrushy of this charge, you must find that any failure to fairly present financial information concerned a material matter. For purposes of this certification provision, a matter is "material" if a substantial likelihood exists that a reasonable investor would consider it important in determining whether to buy or sell HealthSouth securities.

Finally, with respect to Count 27, False Certification, I instruct you that Mr. Scrushy's conduct cannot be criminal unless the Government shows beyond a reasonable doubt that his conduct meets the stringent knowledge requirements of the Sarbanes-Oxley statute. The Government must prove beyond a reasonable doubt not only that Mr. Scrushy knew that the periodic report contained materially false information; the Government must also prove beyond a reasonable doubt that Mr. Scrushy falsely certified that the report was materially accurate; and the Government must show that Mr. Scrushy did so knowing that such false certification was forbidden by the Sarbanes-Oxley law, and that Mr. Scrushy made the false certification with the specific intent to violate the law.

COUNTS THIRTY-FOUR THROUGH THIRTY-SEVEN, THIRTY-NINE, FORTY, AND FORTY-TWO THROUGH FORTY-FIVE: MONEY LAUNDERING

Counts 34 through 37, 39, 40, and 42 through 45 charge Mr. Scrushy with money laundering with respect to ten separate and distinct purchases. Those items are found at pages 33-34 of the Superseding Indictment.

Title 18, United States Code, Section 1957 makes it a federal crime or offense for anyone to engage in certain kinds of financial transactions commonly known as money laundering. You can find Mr. Scrushy guilty of these charges

only if the Government proves all of the following elements beyond a reasonable doubt with respect to each purchase charged in the Superseding Indictment:

First: The Defendant knowingly engaged or attempted to engage in a monetary transaction; and

Second: The Defendant knew the transaction involved criminally derived proceeds; and

Third: The criminally derived proceeds used in the charged transaction were greater than $10,000; and

Fourth: The criminally derived proceeds were, in fact, derived from specified unlawful activity, that is a scheme and artifice to defraud stockholders, bondholders, potential stockholders and bondholders, underwriters, bond underwriters, HealthSouth and others as alleged in Counts 3 through 23 of the Superseding Indictment; and

Fifth: The transaction occurred in the United States.

"**Monetary transaction**" means the transfer, in or affecting interstate commerce, of funds or a monetary instrument by, through, or to a financial institution.

"**Monetary instrument**" is coin or currency of the United States, travelers' checks, or bank checks.

The term "**financial institution**" includes a bank or an investment company.

"**Criminally derived proceeds**" means any money constituting, or derived from a criminal offense. The Government must prove Mr. Scrushy knew the proceeds involved in the monetary transaction constituted, or were derived from, proceeds obtained by some criminal offense. The Government does not have to prove that Mr. Scrushy knew the precise nature of that criminal offense, or that Mr. Scrushy specifically knew that the property involved in the transaction represented the proceeds of a scheme or artifice to defraud stockholders, bondholders, potential stockholders and bondholders, underwriters, bond underwriters, HealthSouth and others.

"**Specified unlawful activity**" means the criminal acts charged in the Superseding Indictment including securities fraud, mail fraud, and wire fraud.

The Government does have to prove beyond a reasonable doubt that the proceeds, in fact, did come from one of the specified unlawful activities actually charged in the Superseding Indictment. You must all agree as to which specified unlawful activity resulted in the criminally-derived proceeds used for the transaction.

The Government does not have to prove that all of the funds used in each charged transaction were criminally-derived proceeds. However, the Government

does have to prove beyond a reasonable doubt that more than $10,000.00 of the funds used in each charged transaction were criminally-derived proceeds.

In seeking to prove that each charged purchase used more than $10,000 of criminally-derived proceeds, the Government has relied upon the testimony of Mr. William Bavis. Some of Mr. Bavis's assumptions include, among other things, the value of Mr. Scrushy's liquid assets before the fraud began at HealthSouth, whether the stock options he received before 1996 had any value, and what funds should be considered criminally-derived proceeds.

As I instructed you at the time of his testimony, as with all expert testimony, you must decide for yourself whether to accept the assumptions he made and the methodology he employed to support his opinions about the amount of proceeds used in each charged purchase. If you disagree with his assumptions or methodology, you do not have to accept his opinions.

If you reject his assumptions and/or conclusions, except as to Count 42, then you do not have enough evidence to convict Mr. Scrushy of money laundering.

The reason I excluded Count 42 is that the Government offered alternative evidence concerning the proceeds allegedly used for that transaction. You must still review and evaluate Mr. Bavis's testimony concerning that count to determine

whether the Government proved beyond a reasonable doubt all the elements required for a conviction.

Aiding and Abetting

When you review the Superseding Indictment, you will also see that, for some of the substantive Counts on which I have instructed you, the Government has charged Mr. Scrushy with aiding and abetting the commission of those offenses. The specific counts for which the Government charges Mr. Scrushy with aiding and abetting are the securities fraud charges (Counts 2 and 3); wire fraud charges (Counts 4 through 16); mail fraud charges (Counts 17 through 23); false statements charges (Counts 25 and 26); false certification charge (Count 27); and money laundering charges (Counts 34 through 37, 39, 40, and 42 through 45). The Government has charged that Mr. Scrushy committed those substantive offenses, and has also charged that he aided and abetted the commission of those substantive offenses in violation of Title 18, United States Code Section 2.

The guilt of a defendant in a criminal case may be proved without evidence that the defendant personally did every act involved in the commission of the crime charged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished through his direction of another person as an agent, or

by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee or other associate of Mr. Scrushy were willfully directed or authorized by him, or if Mr. Scrushy aided or abetted another person by willfully joining together with that person in the commission of a crime, then the law holds Mr. Scrushy responsible for the conduct of that other person just as though Mr. Scrushy had personally engaged in the conduct.

However, before you can hold Mr. Scrushy criminally responsible for the conduct of others, the Government must prove beyond a reasonable doubt that Mr. Scrushy willfully associated himself in some way with the crime, and willfully participated in it. Mere presence at the scene of a crime or even knowledge that a crime is being committed is not sufficient to establish that Mr. Scrushy either directed or aided and abetted the crime. You must find beyond a reasonable doubt that Mr. Scrushy was a willful participant, and not merely a knowing spectator, to convict him of aiding and abetting.

_____To convict Mr. Scrushy as an accomplice of a charged crime on an aiding and abetting theory, the Government must prove three things beyond a reasonable doubt:

1. that the Defendant associated himself with the crime as something he wished to bring about; and

2. that the Defendant participated in the crime; and

3. that the Defendant sought by his actions to make the crime succeed.

Count 1 - Conspiracy

In Count One of the Superseding Indictment, the Government charges that Mr. Scrushy participated in a criminal conspiracy to unjustly enrich and benefit himself and others by fraudulently inflating the results of operations and the financial condition of HealthSouth that it reported to others. A conspiracy is an agreement or a kind of partnership for criminal purposes. The essence of a conspiracy is the agreement or plan to violate the law.

The other Counts on which I just instructed you are substantive offenses. If you return a verdict of guilty on any of those specific Counts, you must unanimously find beyond a reasonable doubt the actual completion of the offense charged. Unlike these earlier counts, the conspiracy count does not rest on the completed commission of a substantive offense. Conspiracy, instead, has its own set of elements that does not include the completed commission of any other substantive offense or crime.

Title 18, United States Code, Section 371, makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another federal crime or offense. So, under this law, a conspiracy is an agreement or a kind of partnership for criminal purposes in which each member becomes the agent or partner of every other member.

To prove a conspiracy offense the Government does not have to prove that all of the people named in the Superseding Indictment were members of the scheme; *or* that those who *were* members had entered into any formal type of agreement; *or* that the members had planned together *all* of the details of the scheme; or that the "**overt acts**" charged in the Superseding Indictment would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself, followed by the commission of any charged overt act, the Government does not have to prove the conspirators actually succeeded in accomplishing their unlawful plan.

You can find Mr. Scrushy guilty of conspiracy as charged in Count One *only* if the Government proves all of the following elements beyond a reasonable doubt:

First: That the Defendant with one or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the Superseding Indictment; and

Second: That the Defendant knew the unlawful purpose of the plan and willfully joined the plan; and

Third: That during the course or the existence of the conspiracy, one of the members of the conspiracy knowingly committed at least one of the "overt acts" described in the Superseding Indictment at pages 12-20; and

Fourth: That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "**overt act**" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy. The specific overt acts with which the Government charges Mr. Scrushy are found in paragraphs 41 through 81 of Count 1 on pages 12 through 20 of the Superseding Indictment.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not, standing alone, establish proof of a conspiracy. The mere fact that Mr. Scrushy may have

benefitted from the results of the conspiracy, without more, does not prove that Mr. Scrushy was part of the conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way that advances some purpose of the conspiracy, does not thereby become a conspirator. Additionally, although the indictment may contain many alleged overt acts, the law only requires that you agree unanimously that the Government proved *one* overt act beyond a reasonable doubt. To convict, you must be unanimous in agreeing which overt act the Government proved beyond a reasonable doubt.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if the Defendant has a general understanding of the unlawful purpose of the plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict that Defendant for conspiracy even though he did not participate before that event, and even though he played only a minor part.

Count One--Conspiracy with Multiple Criminal Objectives

In this instance, regarding the alleged conspiracy, the Superseding Indictment charges that Mr. Scrushy conspired to commit ten separate substantive crimes or offenses. The Government does not have to prove that Mr. Scrushy willfully conspired to commit *all* ten substantive offenses. The proof would be

sufficient if the Government proves, beyond a reasonable doubt, that Mr. Scrushy willfully conspired with at least one person to commit *one* of those offenses. But, in that event, to return a verdict of guilty, you must unanimously agree upon which one of the ten offenses the Defendant conspired to commit. If you cannot unanimously agree that Mr. Scrushy conspired to commit a particular offense, then you must find Mr. Scrushy not guilty of the conspiracy Count.

The charged offenses of the conspiracy are listed at Pages 6 through 8 of the Superseding Indictment.

The *first* unlawful offense of the conspiracy charged is *Mail Fraud*. I have already instructed you on the elements of Mail Fraud for Counts 17 through 23. (See pages 35 - 41 of these Instructions.)

The *second* unlawful offense of the conspiracy charged is *Wire Fraud*. I have already instructed you on the elements of Wire Fraud for Counts 4 through 16. (See pages 29 - 35 of these Instructions.)

The *third* unlawful offense of the conspiracy charged is *Bank Fraud*. The elements of the crime of bank fraud in violation of 18 U.S.C. § 1344 are the following:

First: That the Defendant executed or attempted to execute a scheme or artifice to defraud a financial institution, or to obtain money, funds or credits from a financial institution by means of materially false or fraudulent pretenses, representations or promises; and

Second: That the Defendant did so willfully and with an intent to defraud; and

Third: That the false or fraudulent pretenses, representations or promises were material; and

Fourth: That the financial institution was federally insured.

The *fourth* unlawful offense of the conspiracy charged is *False Statements*. I have already instructed you on the elements of False Statements for Counts 25 and 26. (See pages 41 - 42 of these Instructions.)

The *fifth* unlawful offense of the conspiracy charged is *False Certification*. I have already instructed you on the elements of False Certification for Count 27. (See pages 43 - 47 of these Instructions.)

The *sixth* unlawful offense of the conspiracy charged is a type of *Securities Fraud*. I have already instructed you on the elements of this type of Securities Fraud for Count 2. (See pages 24 - 26 of these Instructions.)

The *seventh* unlawful offense of the conspiracy charged is to make and cause others to make untrue, false and misleading statements of material fact in reports and documents required to be filed pursuant to the Securities and Exchange Act of 1934 and the rules and regulations thereunder. The statutes and regulations relevant to this offense require that a company that issues securities on a national exchange file information with the SEC on various Forms, including Forms 10-Q, 10-K, and 8-K.

To find this seventh offense proved, you do not need to find that an agreement to file false financial statements existed with respect to each one of the financial statements filed during the charged period of the conspiracy in Count One. To establish guilt, the Government must prove beyond a reasonable doubt the agreement to commit the crime with respect to any one of those financial statements.

The elements of this underlying offense are:

First: That HealthSouth was required to file the reports; and

Second: That the Defendant made, or caused another to make, a materially false or misleading statement in reports or documents required to be filed under the Securities and Exchange Act of 1934 and the rules and regulations thereunder; and

Third: That the Defendant acted knowingly and willfully.

The *eighth* unlawful offense of the conspiracy charged is to falsify and cause others to falsify books, records and accounts of HealthSouth. Companies that are required to file reports containing financial statements with the SEC must also "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." The law further provides that "No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account" that is required to be made or kept.

The elements of this underlying substantive offense are:

First: That HealthSouth was required to file reports with the SEC; and

Second: That the Defendant falsified, or caused another person to falsify, the books, records, or accounts of HealthSouth; and

Third: That the Defendant acted knowingly and willfully.

The term "**records**" means accounts, correspondence, memoranda, tapes, discs, papers, books, and other document or transcribed information of any type, whether expressed in ordinary or machine language. Such records include, for

example, income statements, balance sheets, general ledgers, journals, and account records.

The *ninth* unlawful offense of the conspiracy charged is to make and cause others to make materially false and misleading statements, or to omit to state and cause others to omit to state material facts to HealthSouth's *outside auditors* in connection with the preparation and filing of documents and reports required to be filed with the SEC during the period charged in Count One.

The elements of the underlying offense are as follows:

First: That the Defendant, directly or indirectly, made or caused to be made a materially false or misleading statement; or, directly or indirectly, omitted to state, or caused another person to omit to state, a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading; and

Second: That the material false statements or omissions were made to an accountant in connection with (1) an audit or examination of the financial statements of the company, or (2) the preparation or filing of any document or report required to be filed with the SEC; and

Third: That the Defendant acted knowingly and willfully.

The *tenth* unlawful offense of the conspiracy charged is another type of *Securities Fraud*. I have already instructed you on the elements of this type of Securities Fraud for Count 3. (See pages 26 - 28 of these Instructions.)

Those are the alleged objects of the conspiracy. Because the crime of conspiracy is an agreement to commit a crime, the Government does not have to prove–only for purposes of the conspiracy Count–that the actions of the conspirators actually met all the requirements of these offenses; in other words, the crime does not have to be completed for a conspiracy conviction. To convict Mr. Scrushy of conspiracy as alleged in Count One of the Superseding Indictment, you must agree unanimously that Mr. Scrushy conspired with at least one other person to commit one of the above unlawful offenses as charged.

To sustain a conviction for conspiracy as alleged in Count 1, the Government must prove beyond a reasonable doubt each of the following:

1. An agreement in which Mr. Scrushy participated between two or more persons to act together in committing an offense against the United States as alleged in Count 1; and

2. The commission of an overt act in furtherance of the conspiracy.

To prove the charge of conspiracy against Mr. Scrushy, the Government must also prove beyond a reasonable doubt that Mr. Scrushy understood the

purpose of the conspiracy and voluntarily took some action indicating his participation.

DELIBERATE IGNORANCE

In all of the Counts of the Superseding Indictment, Mr. Scrushy's knowledge is an essential element of the required proof. When proof of knowledge of a particular fact is an essential part of an offense, the Government must prove beyond a reasonable doubt that Mr. Scrushy was aware of a high probability of that particular fact's existence, unless Mr. Scrushy actually believed it did not exist.

In other words, you may find that Mr. Scrushy acted "knowingly" if you find beyond a reasonable doubt either the Defendant actually knew of the particular facts he is charged with having knowledge of; or the Defendant deliberately closed his eyes to what he had every reason to believe was the fact.

However, your decision about Mr. Scrushy's knowledge must be based on actual proof, not just an assumption that Mr. Scrushy should have known about the fraud because he was the CEO of HealthSouth.

I must emphasize, however, that the Government cannot establish the requisite proof of knowledge on the part of Mr. Scrushy by merely demonstrating that Mr. Scrushy was negligent, careless, or foolish.

Good Faith Defense to Charge of Intent to Defraud

Good faith is a complete defense to all of the charges in the Superseding Indictment because good faith on the part of Mr. Scrushy would be inconsistent with the existence of an intent to defraud or willfulness that are essential parts of the charges. Mr. Scrushy does not have to prove good faith, of course, because Mr. Scrushy has no burden to prove anything. The Government must prove beyond a reasonable doubt that Mr. Scrushy acted knowingly and willfully with the specific intent to defraud as charged in the Superseding Indictment.

One who has an honestly held opinion, or an honestly formed belief, cannot have fraudulent intent even though his opinion is erroneous or his belief is mistaken. And, similarly, evidence that establishes only that a person made a mistake in judgment or an error in management, or was careless does not establish fraudulent intent.

On the other hand, an honest belief on the part of Mr. Scrushy that a particular business venture was sound and would ultimately succeed would not, in and of itself, constitute "good faith" as that term is used in these instructions if, in carrying out that venture, Mr. Scrushy knowingly made false or fraudulent representations to others with the specific intent to deceive them.

THEORY OF DEFENSE INSTRUCTION

Mr. Scrushy has pled not guilty to all counts of this indictment. I have instructed you that the burden of proof rests on the Government to prove every element of each count beyond a reasonable doubt. Mr. Scrushy's defense is that he never conspired to commit fraud or securities law violations, or any of the other alleged offenses of the conspiracy; and that he never committed any of the substantive offenses alleged, or aided or abetted in the commission of those offenses.

Specifically, by his plea of "not guilty," Mr. Scrushy has denied knowledge of any of the alleged misconduct about which you have heard testimony. If you believe that the Government has not proven beyond a reasonable doubt that Mr. Scrushy had knowledge of the fraud and willfully participated in it, then you must acquit. Mr. Scrushy could be aware of some of the conduct but not necessarily have enough knowledge or fully understand the implications of that knowledge sufficiently for you to conclude that he acted willfully. Remember that I have also instructed you that just because someone's conduct appears to assist or advance some illegal act does not, by itself, mean that the defendant was acting knowingly and willfully as the law requires.

If Mr. Scrushy had a good faith belief that the financial statements, press releases, annual reports, statements made in the earnings conference calls, SEC filings, and Sarbanes-Oxley certifications were based on accurate, appropriate accounting, then that belief would negate the mental state that the Government is required to prove.

In determining whether Mr. Scrushy had such a good faith belief, you may consider–but are not bound by-- whether professionals such as the accountants at Ernst & Young, who were the outside auditors, also believed that the certifications and statements were accurate. In determining whether Mr. Scrushy knew or could have known these reports were inaccurate, you may consider–but are not bound by-- whether other professionals with the means, the skills, and the responsibility to examine the books and records of HealthSouth failed to detect an irregularity.

In his defense, Mr. Scrushy has directed your attention to former HealthSouth employees who have admitted that have committed crimes. Mr. Scrushy's contention is that former HealthSouth executives falsified documents to obtain large salaries and bonuses, but that they concealed their misconduct from him.

You must remember that by presenting a defense and pointing out evidence to you that Mr. Scrushy has not assumed any burden of proof. Throughout the trial

the burden of proof remains on the Government. However, you can consider the defense presented by Mr. Scrushy, along with all of the other evidence in deciding if the Government has proven its case beyond a reasonable doubt.

Conclusion

Charges to be Considered

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether the Government has proved that Mr. Scrushy is guilty or not guilty. Mr. Scrushy is on trial only for the specific offenses alleged in the 36 counts of the Superseding Indictment and no others.

Your focus, thus, must be on the precise crimes charged in the Superseding Indictment. You cannot substitute any different charges that you may think should have been brought against Mr. Scrushy. You must decide whether he is guilty or not guilty for each charge and only each charge contained in the Superseding Indictment.

Punishment

Also, you, the jury, should never consider the question of punishment in any way in deciding the case. If Mr. Scrushy is convicted, the matter of punishment is for the judge alone to determine later.

Unanimity and Uniformity

As to each count, any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, you must unanimously agree on a verdict of either "guilty" or "not guilty." If you unanimously find that you have a reasonable doubt as to whether the Government met its burden of proof as to any count, then you must find Mr. Scrushy not guilty of that count. However, to convict Mr. Scrushy, you must all agree that the Government met its burden of proof beyond a reasonable doubt as to every element of the count or counts on which you find Mr. Scrushy guilty.

As to the conspiracy count, if you unanimously agree that the Government proved beyond a reasonable doubt all the elements of conspiracy as explained on pages 53-56 of the Court's Instructions, then you must also agree unanimously on at least one of the charged offenses of the conspiracy, as described on pages 56-62, AND you must unanimously agree on at least one of the overt acts, as explained on page 55. If you find Mr. Scrushy guilty as to the conspiracy charge, you do not have to reach unanimous agreement as to every charged offense of the conspiracy or every overt act, as long as you unanimously agree on at least one of each.

The verdict on one count, however, does not have to be the same as the verdict on another count. In other words, you may find the Defendant guilty as to

some counts and not guilty as to others, guilty as to all counts, or not guilty as to all counts.

Duty to Confer

Your duty as jurors is to discuss the case with one another and consult with one another in an effort to reach agreement, if you can do so. Each of you must decide the case for yourself, but only after full and impartial consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to reexamine your own opinion and change your mind, if you become convinced that your initial opinion was wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because the others think differently, or merely to return a verdict.

Juror Notes

In this case you have been permitted to take notes during the course of the trial, and most of you – perhaps all of you – have taken advantage of that opportunity and have made notes from time to time.

You will have your notes available to you during your deliberations, but you should make use of them only as an aid to your memory. In other words, you should not give your notes any precedence over your independent recollection of

the evidence or the lack of evidence; and neither should you be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

Remember, in a very real way you are judges – judges of the facts and judges of the credibility of the witnesses. Your only interest is to seek the truth from the evidence in the case. Your duty is to decide whether the Government has proved the Defendant guilty beyond a reasonable doubt on each count in the Superseding Indictment.

Exhibits

When you retire, in a few minutes Mrs. Wideman will bring into the jury room all of the Exhibits that have been fully admitted into evidence. At that time, when all of you are together, you can begin deliberations. You should spend as much time as you believe is necessary to review those exhibits.

You may recall that I admitted some Exhibits for a limited purpose only. Those exhibits include summary charts and demonstrative exhibits that, as I explained, are not evidence in and of themselves but summarize or illustrate testimony or other exhibits. Those exhibits will not be available to you.

I also admitted the tape recordings as well as recordings of conference calls and company meetings with a limitation. The limitation for those recordings requires that they only be played for you in open court. If you want to listen to those tapes again with or without the transcripts for those recordings, all you have to do is ask. If so, I will arrange for all the necessary equipment to play as much of the admitted recordings as you want to hear.

Court's Exhibits

In normal cases, the only Court's Exhibit that the Jury sees is the Indictment. But in this case, because of the unusual way in which the evidence came in, I instructed that the notebook Mr. Murphy brought to court be marked as a court's exhibit. Both sides used that exhibit with several witnesses and recently moved to have it admitted as any other Exhibit.

So, although it still bears a sticker as a Court's Exhibit, you should treat it like any other Exhibit and should actually consider it as a Joint Exhibit. In other words, do not give any special consideration to that exhibit just because it bears a court exhibit sticker.

Superseding Indictment

You will have another Court's Exhibit. As is customary, I have marked the Superseding Indictment as a Court's Exhibit. You will have it to review as you

decide whether the Government has met its burden to prove beyond a reasonable doubt that charges it made against Mr. Scrushy.

Selection of Foreperson

When you go to the jury room, you may decide whether you want to reconsider your selection of a foreperson. The foreperson will guide your deliberations and will speak for you here in court.

Verdict Form

The court has prepared a verdict form for your convenience and which you will have to use in your deliberations.

The verdict form tracks each count of the Superseding Indictment that is before you for your consideration at this time. For each count, you must unanimously agree on a verdict of guilty or not guilty. If your verdict on a specific count is not guilty, you do not need to answer any of the other questions for that count. If your verdict is guilty, you do have to answer some questions to explain the basis for your decision. Where the Government has charged alternatives, as I explained earlier, the verdict form asks you to indicate on which alternative or alternatives you unanimously agreed to base your verdict. As I instructed you, you have to decide count by count whether the Government has proved beyond a reasonable doubt each element required for that specific count. You will have a

copy of my instructions as a reference to check each required element as you decide whether the Government met its burden of proof.

After you have reached a decision on a count, the foreperson should sign and date the page of the verdict form for that count.

When you have reached unanimous agreement on all counts, you will have your foreperson check the verdict form as to each count, date and sign it, and then return to the courtroom. When you have reached your final decision, knock on the jury room door and tell the marshal that you have a verdict.

Secrecy

Your deliberations will be secret; you will never have to explain your verdict to anyone. After your verdict is announced, the choice will be yours regarding whether you ever discuss your deliberations with anyone.

Communication with the Court

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal, who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, regarding any message or question you might send, that you should not tell me your numerical division at the time.

As an extra precaution at this time, I am instructing you that from now until you return your final verdict in this case you are not to read, watch, or listen to any news reports at all. If anything significant happens that you need to know, you can ask someone else to tell you about it – if it does not involve this case, Mr. Scrushy or HealthSouth. My other instructions remain the same: You are not to discuss this case with anyone – except among yourselves when all twelve of you are present! You are not to allow anyone to discuss this case, or anything about HealthSouth, or Mr. Scrushy in your presence. You are not to do any internet search that could possibly lead you to any information about this case, HealthSouth or Mr. Scrushy.

I want to particularly emphasize that you must not discuss the case at all outside of the jury room. Also, I want to remind you that if anyone other than a fellow juror contacts you about the case, or refuses to stop talking with you about the case, or in anyway attempts to influence your decision about the case, you need to let me know immediately.